PUBLIC PROSECUTOR

v.

MANSOR RANI & ANOR.

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRIAL NO. 47-3-91]
12 MARCH 1992

CRIMINAL PROCEDURE: *Accused charged with common intention trafficking in 2851.9 grammes of a dangerous drug cannabis - Issue of fact - Whether evidence of PW7 reliable - Primary facts show no joint concert between the 1st accused and the 2nd accused - Story of the 2nd accused - Never put to PW5 in cross-examination by the learned defence Counsel - Whether material - Totality of evidence - Whether statutory presumption rebutted ss. 37(d), (da)(vi) Dangerous Drugs Act 1952 (the Act).*

The 1st and 2nd accused were charged that with common intention, they trafficked in 2,851.9 grammes of a dangerous drug cannabis, an offence under s. 39B(1) and punishable under s. 39B(2) of DDA 1952 (the Act) read with s. 34 of the Penal Code.

At the close of prosecution's case the learned Judge acquitted the first accused. In respect of the 2nd accused the charge was amended to reflect that the 1st accused was no longer charged with him for the offence. He claimed trial and the learned Judge called upon him to make his defence on the amended charge.

Inter alia, the learned Judge observed that it was not disputed that PW7 was charged with the first and second accused for trafficking and that subsequently on 28 January 1991 he was discharged in the Magistrate Court.

Held:

[1] The learned Judge took the view that the evidence of PW7 was that he knew more than what had actually transpired and that he wove in lies into his evidence to distance himself from the 2nd accused and to help his fellow soldier and friend the 1st accused. The learned Judge therefore felt his evidence needed to be treated with caution.

[2] While the primary facts adduced against the 1st accused showed him to be present where the car stopped at Tandop there was no cogent evidence at all showing nexus between him and the cannabis that was seized from the car. Neither was there evidence of joint concert between the 1st accused and the 2nd accused, the evidence of the driver of the motor car, a witness of doubtful veracity but a witness for the prosecution, being to the effect that the 1st accused was an innocent passenger in his car. In the circumstances the learned Judge acquitted the 1st accused at the close of the case for the prosecution.

[3] The story of the 2nd accused in his defence was never at all put to PW5 when he was cross-examined by Counsel for the 2nd accused. Mansor bin Bakar's evidence was substantially similar to the evidence of PW5 but again the story that he (Mansor bin Bakar) had stopped the car and had waited for and received from a motorcyclist who came there 15 minutes later with a bag which he in turn handed over to the accused was not at all put to Mansor bin Bakar when he was cross-examined by Counsel for the 2nd accused, instead it was put to him that Mansor bin Bakar did not stop at Tandop nor did the 2nd accused get down from the car.

[4] It is manifestly clear that the accused in his defence invented the story that Mansor bin Bakar stopped the car there to wait for a motorcyclist with the bag and to hand him the bag.

[5] Having considered the totality of the evidence adduced in the trial no reasonable doubt has been created in the prosecution's case that the second accused was the man who retrieved the bag of cannabis from some undergrowth at Tandop and that it was found in between his legs in the car that was stopped at Simpang Empat by the police. No reasonable doubt had been created in the learned Judge's mind that the accused was in possession of the bag of cannabis.

[6] On the totality of the evidence adduced on balance of probability the 2nd accused had not rebutted the presumption under s. 37(d) of the act that he knew the drug to be cannabis nor has he, on balance of probability, rebutted the presumption under s. 37(da)(vi) that he trafficked in the cannabis.

[The accused found guilty on the amended charge of trafficking in 2851.9 grammes of cannabis and convicted.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)(vi), 39B(1)(a), (2)
Penal Code, s. 34

For the prosecution - Tun Abdul Majid b. Tun Hamzah, DPP
For the 1st accused - Manjit Singh; M/s. Manjit Singh & Co.
For the 2nd accused - R. Devadason; M/s. Devadason & Devadason

JUDGMENT

KC Vohrah J:

The 1st and 2nd accused were charged that on 29 December 1989 at about 10 p.m. at Batu 7, Jalan Alor Setar - Sungei Petani, Kota Setar, Kedah Darulaman, they, with common intention, trafficked in 2851.9 grammes of a dangerous drug cannabis, an offence under s. 39B(l)(a) and punishable under 39B(2) of Dangerous Drugs Act 1952 (the Act) read with s. 34 of the Penal Code.

At the close of the prosecution's case I acquitted the 1st accused. In respect of the 2nd accused the charge was amended to reflect that the 1st accused was no longer charged with him for the offence. He claimed trial and I called upon him to make his defence on the amended charge.

The case for the prosecution was that at about 9.30 p.m. Detective Police Constable Shahidan bin Mansor (PW5) who was with Detective Police Constable Nasir Abdullah at Batu 3, Tandop, at the old Sungei Petani - Alor Setar road observed, across the road a car stop under a tree. He said that he could see the area because of the road 1ights along the highway and because of lights from passing vehicles. The car had come from the direction of Alor Setar. From his vantage point at a wood factory Shahidan saw a man get down from the left back seat of the car. He saw this man going in the direction of some undergrowth near the tree (marked hutan/semak in the sketch plan P11). He also saw the man in the front seat next to the driver's seat get out of the car and walk up and down the length of the car and after that he saw the man who had gone towards the area of the undergrowth walk towards the car carrying a bag on his right hand. The man entered the left back part of the car while the other man who had come down from the left front side of car entered the car through the left front side. Shahidan said that after that he saw the car proceed in the direction of Sungei Petani.

Shahidan stated that his companion then communicated through his walkie talkie with Inspector Yaacob (PW2) when the car moved away after which he and his companion then got on a motorcycle and tailed the car. At Simpang Empat, 1 kilometer away from where he had observed the stop, he saw that Inspector Yaacob had successfully intercepted the car. He then stood guard at the back of the car. Subsequently on the instruction of Inspector Yaacob he arrested the 2nd accused, the person who was sitting on the left side of the back seat.

Inspector Yaacob who had instructed DPC Shahidan and his companion, DPC Mohd. Nasir, to keep watch at their observation point at Batu 3, Tandop (where DPC Shahidan eventually observed the car) said that at 9.30 p.m. he received a call from DPC Mohd. Nasir through the walkie talkie to stop car bearing Registration Number NF 4325, Mazda 808, grey in colour. He was then waiting in a car at Titi Siam in ambush in a car near the town of Simpang Empat. He said that when the car NF 4325 passed his ambush point, he followed the said car from a distance of 15 yards and while doing so he noticed DPC Shahidan and his companion following behind his car.

Inspector Yaacob stated that when the car he was following reached the front of the Shell petrol station there was a signal from the car indicating it was coming to a stop but it did not do so; instead it proceeded towards a junction. When the car neared the Simpang Empat police station Inspector Yaacob instructed the driver of his car to overtake the said car and Insp. Yaacob himself signalled the car to stop. The said car came to a stop (at Batu 7, Jalan Alor Setar - Sungei Petani) and Insp. Yaacob identified himself as a police officer. He saw 3 persons in the car, Mansor bin Rani, the 1st accused who was sitting beside the driver, Mansor bin Bakar, (PW7) and the 2nd accused. The 2nd accused was sitting in the back seat on the left. Constable Dol Bahari (PW6) substantial1y corroborated the testimony of Inspector Yaacob on the events leading to and ending in the police stopping of the car. Inspector Yaacob also stated that he saw that there was a black cloth bag (P4A) in the car between the legs of the 2nd accused, Ayamperumal. He instructed all 3 occupants to come out of the car and he then examined the cloth bag and found that it contained 3 bundles wrapped in clear plastic (P5A, P6A and P7A respectively) and he suspected that they contained ganja (cannabis). Inspector Yaacob said that at that time he did not discover any other thing in the car.

The 3 occupants were then arrested and they were escorted across the road to the Simpang Empat Police Station which was opposite the ambush point.

At the police station Insp. Yaacob made a further inspection of the car and found in the boot a briefcase and a plastic bag. In the plastic bag was a pair of trousers, the front pocket of which had, *inter alia*, dried leaves which he suspected to be ganja. The briefcase contained clothes.

He brought all 3 occupants of the car to the Alor Setar Police Headquarters and surrendered them and the things seized into the care and custody of Insp. Ramli (PW8).

Inspector Ramli confirmed he took custody of all 3 persons and the things seized, that is the bag, P4, with its contents P5A, P6A and P7A, 3 purses, a briefcase containing clothes and a plastic bag containing clothes and the car. He packed P5A, P6A and P7A and the bag P4 and some of the other exhibits and marked and sealed them. He then sent them to a government chemist, PW1, and later received the same exhibits from PW1 which he then kept in his steel cabinet until their production in Court.

The prosecution also relied on the evidence of Mansor bin Bakar (PW7) the driver of the car that was stopped by the police. He said he used private car as a "pirate taxi". He said that at "past 7 p.m." on 29 December 1989, Mansor bin Rani, the first accused, a fellow soldier and friend, requested him to give a lift to his wife to Kepala Batas for a massage. This was behind Hankyu Jaya, a supermarket. As he did not have enough petrol in his car and he had only RM3 on his person and in order to pay for extra petrol he decided to pick up and he picked up a passenger, the 2nd accused who wanted to go to Simpang Empat, the fare having been agreed at RM10. The 2nd accused brought a briefcase and a plastic bag with him which were placed in the back cabin with him; the briefcase was placed on the seat. The three of them then proceeded in the car to Simpang Empat and at Tandop along the Alor Setar - Sungei Petani road the 2nd accused who was sitting alone at the back suddenly requested him to stop at a place called Tandop which he did. The 2nd accused suddenly got out of the car and PW7 asked him where he was going and the man said that he wanted to pick up a bag. After half an hour PW7 then requested Mansor bin Rani to look for the second accused. Mansor bin Rani fixed on his artificial leg and went out of the car and five minutes later he came back to the car. Then the 2nd accused came back with a bag. PW7 turned back and asked the 2nd accused what he was carrying and the man said it was a bag of clothes. PW7 stated that after that he proceeded on and as he was bringing his car to a stop near the Simpang Empat police station at the request of the second accused a car stopped in front of his car. It was the police and they arrested all three of them.

It is not disputed PW7 was charged with the 1st and 2nd accused for trafficking and that subsequently on 28 January 1991 he was discharged in the Magistrates Court. My view of his evidence was that he knew more than what had actually transpired and that he wove in lies into his evidence to distance himself from Ayamperumal, the 2nd accused and to help his fellow soldier and friend, Mansor bin Rani the 1st accused. I therefore felt his evidence needed to be treated with caution. His evidence, however, of his stopping the car at Tandop, and of Ayamperumal going out of the car and then coming back into the back of the car and of Mansor bin Rani getting out of the car and walking in the area broadly neither detracts from nor contradicts the evidence of DPC Shahidan, PW5, that he saw a car stop, a man get out from the back of the car and walk away from the car and another man get out from the front of the car and walk; and that he saw the first man return with a bag and get into the back of the car.

I now come to the evidence of the government chemist PWl. He stated that on 5 January 1990 he received from Inspector Ramli 4 packages marked E1, E2, E3 and E7 and 4 envelopes marked E, E4, E5 and E6, all with intact seals of Polis Di Raja Malaysia.

He carried out various tests on the black bag (P4A) found in envelope marked "E" and the 3 plastic bundles of dried plant material (P5A, P6A and P7A) in the packages E1, E2 and E3 respectively. He tested the dust and the minute amount of dried plant material which he found in the bag and the tests he undertook showed in these the presence of cannabis resin, the cannabis resin being as defined under s. 2 of the Act. In the package marked "E" he found a plastic package of dried plant material containing 953.0 grammes of cannabis. In the package marked "E2" he found a plastic package of dried plant material containing 944.9 grammes of cannabis. In package marked "E3" he found a plastic package of plant material containing 954.0 grammes of cannabis.

The total amount of "cannabis", a drug defined under and classified as a dangerous drug under s. 2 of the Act came to 2,581.9 grammes.

As for the other packages and envelopes, the chemist found in E4, E5 and E6 a purse each and in E7 what he called a suitcase. He did not detect any cannabis in any of the items.

The chemist made a mistake when he wrongly identified an envelope as containing the black bag P4A when it should have been another envelope. It was a minor error and did not effect his expert evidence which I accepted that the said bag contained traces of cannabis resin and that the 3 packages of plant material (P5A, P6A and P7A) contained 2851.9 grammes of cannabis.

While the primary facts adduced against the 1st accused, Mansor bin Rani, showed him to be present where the car stopped at Tandop there was no cogent evidence at all showing a nexus between him and the cannabis that was seized from the car. Neither was there evidence of joint concert between the 1st accused and the 2nd accused, the evidence of the driver of the motor car, Mansor bin Bakar, a witness of doubtful veracity but a witness for the prosecution, being to the effect that the 1st accused was an innocent passenger in his car. In the circumstances I had to acquit the 1st accused at the close of the case for the prosecution.

As for the 2nd accused, Ayamperumal, at the close of the case for the prosecution the primary facts showed that the 2nd accused was seen at night alighting from the rear right side of the car and going to some undergrowth area near the car and then returning to and entering the same rear right side of the car carrying a bag. The said car was tailed all the way to the point where the car was stopped by PW2 and the man found sitting in the rear right side of the car was Ayamperumal, the 2nd accused. In the car were two other occupants - The driver and a passenger, Mansor bin Rani, the 1st accused sitting, next to the driver. And Ayamperumal had a bag containing 3 packages of cannabis between his legs and there was no other bag in the back cabin of the car; this was the bag with the 3 packages of cannabis seized by the police. These primary facts showed that the accused was not only in control and custody but also in possession of the bag and its contents. Relying on s. 37(d) of the Act until the contrary is proved, he is deemed to have known that the drug was cannabis and relying on s. 37 (da)(vi), the weight of the cannabis being 2851.9 grammes, until the contrary is proved he is deemed to have trafficked in the cannabis.

I therefore called upon him to make his defence on an amended charge of his trafficking in the said cannabis. He elected to give evidence on oath and called 5 witnesses.

Defence

The 2nd accused did not deny that he was in the car that stopped at Tandop. But for the first time - This was never put to DPC Shahidan, PW5, or Mansor bin Bakar, who both had testified as to what had transpired when the car stopped - The story was that it was the driver of the car, Mansor bin Bakar, who stopped the car there and waited at that place until a motorcyclist came along and handed a bag to him (Mansor bin Bakar) who in turn handed it over to him (the 2nd accused) who was sitting in the back seat. He said he did not know what was in the bag; he was merely an innocent passenger; it was Mansor bin Rani who arranged to give him a lift in the car to Butterworth where he intended to take a bus home to Kuala Lumpur. He denied the testimony of Inspector Yaacob (PW2) that the bag was between his legs when the car was stopped by the police at Simpang Empat.

The 2nd accused who was working as a driver in the Jabatan Parit Taliair (JPT) in Kuala Lumpur gave a lengthy story as to why he was found in Kedah, how he came to know Mansor bin Rani and Mansor bin Bakar and how eventually they became occupants of the car.

He said his wife was having "mental problems". He stated that he, intending to see a bomoh in Kangar, Perlis, for his wife's illness, left Kuala Lumpur for Perlis on an express night bus on 22 December 1989. The bus arrived in Alor Setar around 7.30 a.m. on 23 December 1989 but the bus did not go to Perlis as there were not many passengers going there and he got down. He said he visited an old friend, one Hamid, at the JPT Alor Setar. He spent some time with him and told him he wanted to see a bomoh in Kangar and Hamid told him there were good bomohs in Alor Setar as well. Hamid took him to the Kepala Batas Army Camp where he was introduced to Mansor bin Rani (the erstwhile 1st accused). He said he, Mansor bin Rani and 2 others then went in a car to Danok at the border between Thailand and Malaysia where Mansor got down and went into an army camp telling him that "he was going to see a bomoh" though under cross - examination he denied that Mansor bin Rani told him that. The 2nd accused did some shopping at the border area and Mansor bin Rani subsequently told him that the bomoh was not there. Mansor bin Rani then brought the 2nd accused to a house in Alor Setar where the 2nd accused put up the night. The 2nd accused took a bus the next morning to Kangar and went to the house of one Gopal Appukutty (DW4) and told him that he wanted to see a bomoh regarding his wife's problem. The next day, Christmas Day, another friend, Selvam (DW5, known as Tharmaraiselvam s/o Raju) brought him to see a bomoh, Ku Hamid bin Ku Yaacob (DW3). He said that the bomoh gave him a piece of paper written in jawi script, some red round pills in a plastic bottle and some makjun, a green paste. He left for Alor Setar that evening and stayed in a hotel until 29 December.

His evidence was that he took leave for the 23rd and 24th and the question is, why did he stay on till 29 December? His explanation was that he wanted to see a bomoh in Alor Setar and that Mansor bin Rani told him "they" would get a bomoh for him on 28 December 1989 but Mansor bin Rani told him on that night that he was unable to get a bomoh.

The 2nd accused said that he was annoyed and that he told Mansor bin Rani that he wanted to go back to Kuala Lumpur. Mansor bin Rani told him he himself was going to Penang and offered him a lift to Penang.

He said that Mansor bin Rani came to fetch him the next day (that is, 29 December 1989) at 6.00 p.m. from the hotel to his house and there he met Mansor bin Bakar, PW7. At about 6.30 p.m. the three of them left for his hotel in Mansor bin Bakar's car where he picked up his only belonging, a briefcase. He sat in the back seat of the car and saw a plastic bag on the floor board behind the seat of Mansor bin Bakar who was driving the car. They left at 7.45 p.m. for Penang.

He said that on the way Mansor bin Bakar stopped the car and after about 15 minutes a motor cycle arrived there and the motorcyclist handed a black bag to Mansor bin Bakar. Mansor bin Bakar then gave the bag to him and requested him to put it at the back and he put it on his right hand side. He denied that he knew the contents of the bag. He denied he got down and walked in the area.

He said that Mansor bin Bakar then drove off and at Simpang Empat the police ambushed the car. All the occupants of the car were brought out of the car and handcuffed and then somebody kicked him and asked him "Whose bags are that?". He said he replied the briefcase was his.

The main thrust of the story of his visit to Alor Setar, the border area and Kangar is to show that he was solely involved in looking for a bomoh for his wife's "mental problems" and that he had nothing to do with the cannabis that had been seized by the police. That

his wife has mental problems I can accept bearing in mind the evidence of Dr. U. Khant (DW2) a lecturer of psychistry from the University of Malaya and the evidence of the 2nd accused's mother (DW6). His story that he visited a bomoh on 25 December 1989 in the company of Selvam DW5, may probably be true. But I am unable to accept that the sole purpose of his coming north from Kuala Lumpur was to see a bomoh at Kangar. I find it hard to believe that he should be in the northern region for 7 days from 23 December 1989 to 29 December 1989 merely to look for a bomoh and in any event one would have expected someone making a trip all the way from Kuala Lumpur to Kangar to have made a prior appointment to see the bomoh through friends (as undoubtedly he had - DW4 and DW5) before one leaves Kuala Lumpur for the north.

I also find it hard to believe that after having found a bomoh who had given advice and had "prescribed" native medicine for the wife's use he should have stayed back for another 4 days to consult another bomoh that, he said, Mansor bin Rani promised to find for him.

I now come to his story about the stopping of the car at Tandop. His story that Mansor bin Bakar stopped the car at Tandop to wait for a motorcyclist who came 15 minutes later and handed a bag to Mansor bin Bakar was never put to DPC Shahidan, PW5, nor to Mansor bin Bakar, PW7 himself. The accused did not dispute that he was sitting alone in the back seat of the car. What PW5 saw from his observation point was a man get out from the right rear part of the car and go to some undergrowth and return later with a bag and get back into the car from where he came. The story of the 2nd accused in his defence was never at all put to PW5 when he was cross-examined by Counsel for the 2nd accused. Mansor bin Bakar's evidence was substantially similar to the evidence of PW5 but again the story that he (Mansor bin Bakar) had stopped the car and had waited for and received from a motorcyclist who came there 15 minutes later with a bag which he in turn handed over to the accused was not at all put to Mansor bin Bakar when he was cross - examined by Counsel for the 2nd accused; instead it was put to him that Mansor bin Bakar did not stop at Tandop nor did the 2nd accused get down from the car. It is manifestly clear that the accused in his defence invented the story that Mansor bin Bakar stopped the car there to wait for a motorcyclist to hand him a bag.

The clear evidence of PW5 was that a man from the left rear side of the car got down at Tandop, that he went to some undergrowth, came back and entered the same rear left side of the car with a bag, that the car proceeded to Simpang Empat, that he tailed it until it was stopped by Inspector Yaacob and his men. It was this man at the rear, the only occupant in the rear who was seen by Inspector Yaacob to have a bag, the only bag in the back cabin of the car, between his legs and this man was the 2nd accused, Ayamperumal. I can see no reason to disbelieve the clear evidence of DPC Shahidan and Inspector Yaacob and I do not have to resort to the evidence of Mansor bin Bakar for support of DPC Shahidan's testimony.

The 2nd accused did dispute that the bag of drugs was found between his legs but the evidence of Inspector Yaacob, who had no reason to lie, was that it was between his legs and that it was the only bag in the back cabin. Defence Counsel made an issue of the fact that while Inspector Yaacob stated he did not open the boot of the car at the place of ambush but at the police station, PW5 and PW6 had stated that the Inspector did examine the boot. My view, however, is that the discrepancy is minor and does not affect the evidence of Inspector Yaacob that the bag of drugs was found between the legs of the accused and there was no other bag in the back cabin.

Counsel also cross-examined Inspector Yaacob whether the accused had a piece of paper written in jawi script in his purse, some pills and some makjun. He said he did not. Inspector Ramli, the investigation officer was asked if he saw the pills and the makjun. He said he did not. The evidence of the bomoh and of the 2nd accused was that he had received these items from the bomoh and the police had seized them. But I cannot see any reason for the police officers to lie on the matter.

Having considered the totality of the evidence adduced in the trial no reasonable doubt has been created in the prosecution's case that the second accused was the man who retrieved the bag of cannabis from some undergrowth at Tandop and that it was found in between his legs in the car that was stopped at Simpang Empat by the police. No reasonable doubt had been created in my mind that he was in possession of the bag of cannabis.

Again, on the totality of the evidence adduced, on balance of probability the 2nd accused has not rebutted the presumption under s. 37(d) of the Act that he knew the drug to be cannabis nor has he, on balance of probability, rebutted the presumption under s. 37(da) (vi) that he trafficked in the cannabis. I therefore find him guilty on the amended charge of trafficking in 2,851.9 grammes of cannabis and I convict him.

Also found at [1996] 2 CLJ 1064